United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1901

B

To be argued by
EDWARD BRODSKY

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1901

UNITED STATES OF AMERICA,
Appellee,

—v.—

KARL SCHWARTZBAUM,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT

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ARGUMENT:

POINT I—The defendant was entitled to a new trial when, following trial, it was established that Glasser had perjured himself with regard to material facts.

Alternatively, the defendant is entitled to a hearing at which he would have the opportunity to: 1) examine Glasser with regard to his perjurious

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United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

—v.—

KARL SCHWARTZBAUM,

Defendant-Appellant.

BRIEF IN BEHALF OF APPELLANT

Questions Presented for Review

1. Following the trial herein, it was discovered by the defense and conceded by the Government that the chief and indispensible prosecution witness had perjured himself during his trial testimony. The District Court denied, without a hearing, the defendant's motion for a new trial. The denial of the motion presents the following questions for review:

A. Did due process of law and the proper administration of justice require that the motion for a new trial be granted upon the established facts?

B. Should the trial court have convened an evidentiary hearing for the purpose of determining:

(i) The full extent of the witness' perjury?

(ii) The extent to which the newly discovered evidence bore upon the witness' ability to accurately recollect or willingness to truthfully portray his dealings with the defendant?

(iii) Whether the government knew or should have known material facts, related to the witness' perjury, which were not but should have been revealed to the defense?

2. Under the circumstances of this case, was it an abuse of discretion for the trial court to permit the Government to utilize a memorandum, prepared by Government counsel, for the purpose of ostensibly refreshing the recollection of the chief Government witness as to a critical aspect of the proof in this case?

3. Was the defendant denied due process of law as well as his right to call witnesses in his own behalf when the trial court refused to permit the defense to call one of the trial prosecutors as a witness?

Preliminary Statement

Karl Schwartzbaum appeals from a judgment of conviction entered against him on June 4, 1974, after a jury trial before the Hon. Lawrence W. Pierce, in the United States District Court for the Southern District of New York.

The indictment (A. 3)* was filed on June 21, 1973 (A. 1), and contained thirteen counts. It named four

* The Appellant's Appendix, filed with this Court, includes the various documents relevant to this appeal, as well as the entire trial transcript. The transcript retains its original pagination, and citations to it in this brief are preceded by "Tr." Citations to the other documents are preceded by "A.".

individuals, including appellant Schwartzbaum, as defendants. No two defendants were named in the same count and there was no claim that they acted in concert. On March 13, 1974, Judge Pierce directed that each of the defendants be tried separately from the others (A. 2). For the purpose of appellant's trial, the counts in which he was named (9, 10, 11 & 12 [A. 5]), were, respectively, renumbered 1, 2, 3 & 4.

The charge was that, commencing with "the first third of 1969" and ending with "the first third of 1970" Mr. Schwartzbaum, being an employer in the fur industry, made four payments of $150.00 each to Charles Hoff, an officer of the Furriers Joint Council, a labor organization which represented the employees of Schwartzbaum's company. Each such payment was alleged to have been a violation of 29 U.S.C. § 186(a).

The trial commenced on April 1, 1974, and concluded on April 4, 1974, when the jury returned verdicts of guilty as to Counts 1, 2 and 3. Count 4 had earlier been dismissed by the court, with the consent of the government, due to insufficiency of proof (Tr. 363-4).

Prior to sentence, the defense made two motions for a new trial. The first was based upon asserted errors at trial (A. 6-22). The second was based upon the conceded perjury of the chief and indispensible government witness, Jack Glasser (A. 44-76). Both motions were denied by the trial court (A. 38, 106, 107-32).

On June 4, 1974, Schwartzbaum was sentenced to pay a fine in the sum of $1,000 as to each of the three counts upon which he had been convicted.

Statute Involved

29 U.S.C. § 186 provides, in pertinent part, as follows:

"(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor or consultant to any employer, or who acts in the interest of an employer to pay, lend or deliver, or agree to pay, lend or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in any industry affecting commerce;

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

* * * * *

"(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a Labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer;

"(d) Any person who wilfully violates any of the provisions of this section shall, upon conviction

thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * *."*

Statement of Facts

A. Summary of the Facts

The fur garment manufacturing industry in New York City is composed of some three hundred and twenty five union shops and a number of non-union shops. The union shops are members of a trade organization called the Associated Fur Manufacturers [hereinafter, "The Association"]. The Association employs several individuals called "labor adjusters" who have as their function the supervision of conditions at the shop level and who represent the manufacturers in connection with the day to day problems that arise with the union. For many years, until September, 1970, Jack Glasser was a labor adjuster with 115 shops under his supervision. One of Glasser's shops was K. J. Schwartzbaum, Inc., owned by appellant Karl Schwartzbaum (Tr. 4-6, 38-44, 95).

Workers at the union shops are represented by a union called the Furriers Joint Council [hereinafter, "the Union"]. At the shop level, the union is represented by a "business agent." During the initial period covered by the indictment herein, one of the business agents was Harry Jaffee, and one of the shops to which he was assigned was the Schwartzbaum firm (Tr. 260-63).

A contract between the Association and the Union governs the conditions of employment for union members

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* Enacted June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; September 14, 1959, Pub. L. 86-257, Title V, § 505, 73 Stat. 537; as amended October 14, 1969, Pub.L. 91-86, 83 Stat. 133; August 15, 1973, Pub.L. 93-95, 87 Stat. 314.

and related matters (Tr. 6).* Under the contract, whenever a business agent visited a union shop to investigate conditions there, he was required to be accompanied by a representative of the Association, normally the labor adjuster (Tr. 48-9, 95-6, 261, 266; Gov. Exh. 2, Article 18, § 4).

The union contract contains a provision which prohibits all members of the trade Association from subcontracting work to the non-union shops. Another provision prohibits members from importing fur garments from outside the United States (Tr. 45, 47). Under the contract, if an employer violated either of these provisions, he was subject to the possibility of a fine or other labor action (Tr. 7, 46-7, 168). When such a violation was discovered, attempts were first made to settle the matter informally with the offending employer. If the matter was not thus resolved, a complaint would be filed and it would be referred to a so-called "impartial chairman" for fact-finding and determination (Tr. 49).

It was the function of the labor adjuster to seek the best possible disposition of complaints made against manufacturers. At hearings, he would represent the manufacturer's interest. If a fine were imposed, his objective would be to seek the lowest possible fine (Tr. 48-9, 95-6). If complaints reached the hearing stage, the Union's interest would be represented by Charles Hoff, assistant manager of the Union (Tr. 61-2). It appears that Hoff did not otherwise have any day to day dealings with the manufacturers, and there is no evidence in this case that Hoff ever met or spoke with the defendant Schwartzbaum (Tr. 178).

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* Government Exhibits 1 and 2, respectively, are the contracts for the periods 1965-9, and 1969-72 (Tr. 43-47).

In 1968, the defendant Schwartzbaum found it difficult to compete in the fur industry and decided to reduce his costs by sending some of his work to non-union shops for the creation of fur garments (Tr. 9), and by importing finished garments (Tr. 20), notwithstanding the Union contract.

In September, 1970, the Union charged that Schwartzbaum had violated the subcontracting provision of the contract, and the fact-finding process sustained the charge. As a result, the firm was fined $3,500 (Tr. 19-20, 28-9; Defense Exhibit E).* It is clear beyond doubt that this practice was nothing more than it purported to be and did not, of itself, involve any element of criminality or tax avoidance (Tr. 10-11, 31-32).

It was the Government's contention at trial that during 1968 and 1969 the defendant Schwartzbaum paid money to Glasser and that Glasser, in turn, paid a portion of that money to Hoff for the purpose of insuring that Schwartzbaum's violation of the contract provisions would not cause an incident with the union. If the payments to Hoff were with Schwartzbaum's knowledge, then each such payment constituted a violation of 29 U.S.C. § 186. It was incumbent upon the prosecution at trial, therefore, to establish each of the following facts: 1) that Schwartzbaum made payments to Glasser; 2) that Glasser did not keep all of those payments for himself, but rather paid a portion over to Hoff; and 3) that Schwartzbaum knew such payments were being made to Hoff in his behalf (Court's Charge, Tr. 424-8).

Glasser was the Government's chief witness at trial. The jury's determination depended upon the jury's belief in both the accuracy and the credibility of his testimony.

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* Exhibit E is the report of the impartial chairman of the conference committee of the fur industry.

At trial, Glasser testified that the defendant Schwartzbaum was one of only six manufacturers in whose behalf he entered upon the alleged course of conduct, and that his own profit from these transactions totaled approximately $5,000. Following the trial, the defense discovered that, during this same period, he had deposited almost $57,000, in cash, in his personal bank account. Based upon this discovery, the defense moved for a new trial, contending that the deposits indicated that Glasser had perjured himself in several respects at trial. When thereafter interviewed by Government counsel, Glasser eventually admitted that he had, in fact, perjured himself (Fryman Affidavit, A. 77-87; Court's Opinion, A. 117-8). The motion for a new trial was, nevertheless, denied by the trial court without a hearing (A. 106).

It was the defense contention that the newly discovered evidence revealed a systematic pattern of perjury by Glasser which permeated the substance of the Government's entire case. Glasser's large cash deposits, if known to the defense at the time of trial, would have provided solid evidence of the defense contention that any monies received by him had been kept by him rather than shared with union representatives. As the court charged the jury, such a state of facts would not have supported the charges of the indictment (Tr. 424). Moreover, if it had been known to the defense at the time of trial that Glasser was receiving payments during this two year period from perhaps seventy or more manufacturers, rather than merely the six claimed at trial, then Glasser's alleged recollection of conversations with the defendant would have been severely undermined. As it was, Glasser's trial testimony vacillated on the issue of whether he had actually informed the defendant that payments were being made to the union official in question (*infra*, pp. 14-15). Although his final testimony was that he had conveyed such information to

the defendant, if the extent of his activities had been known by the defense, it would certainly have provided powerful support for the defense contention that Glasser's alleged recollection was false or unreliable.

The facts of the newly discovered evidence are set forth in detail under Point I, *infra*, at p. 19, *et seq.* In order to demonstrate the significance of those facts within the context of Glasser's trial testimony, we shall now set forth the history and substance of that testimony.

B. Sequence of Events Leading to and Following Glasser's Performance as an Immunized Witness

In July, 1970, Glasser took a medical leave from his employment as labor adjuster (Tr. 74). While he was at home, convalescing, two officials of the trade Association visited him and asked if he had been making any payments to anyone at the Union in behalf of manufacturers. He denied any such conduct (Tr. 161, 213-214).*

When he returned to work in September, officials of the Association again questioned him on the same subject and, although they offered him a reward for any information he might have, he nevertheless denied knowledge of such conduct. He was discharged from his employment on that same day (Tr. 161-3, 166).

Glasser then went to see Charles Hoff to request that the Union obtain a lawyer for him to protect his pension rights. He did not tell Hoff that he had been questioned by the Association officials concerning alleged payments to Union officials (Tr. 215-6).

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* At the instant trial, Glasser attributed the commencement of his troubles to the fact that one of the manufacturers "turned *me* in" (Tr. 110).

Almost two years later, in April, 1972, Glasser was questioned by a New York City detective, and by a Federal Strike Force attorney in the Southern District of New York. He again denied any knowledge or participation in a scheme to pay Union officials (Tr. 94, 166-7).

Thereafter, *transactional* immunity was conferred upon Glasser (Tr. 36-7, 84, 229, 418), and he commenced to allege that he had been a go-between for the transfer of payments from six manufacturers (including Schwartzbaum) to Union officials for the purpose of having Union officials disregard contract violations. He admitted to keeping for himself up to fifty percent of such payments.

An indictment was subsequently returned against four union officials (*United States v. Stofsky, et al*,* Indictment No. 73 Cr. 614, So. Dist. of New York; see A. 107), and the instant indictment was returned against four manufacturers (A. 4, 38). Glasser testified at the *Stofsky* trial which ended on February 28, 1974, one month prior to the commencement of the instant trial (A. 107; Tr. 37, 211-12).

On March 26, 1974, six days before the instant trial, Glasser was interviewed by Assistant United States Attorneys Fryman and Sabetta. Sabetta had conducted the *Stofsky* trial, assisted by Fryman, and both men were to conduct the Schwartzbaum trial. Fryman's memorandum of that interview was marked Government's Exhibit 3511 (A. 21), and was utilized at the instant trial to "refresh" Glasser's recollection (Tr. 221-9; Point II, *infra*).

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* Hereinafter, "the *Stofsky* trial." The convictions in that case are presently on appeal to this Court under Docket No. 74-1860.

C. Glasser's Trial Testimony

1. The Alleged Extent and Operation of Glasser's Scheme

Glasser's basic story was that, during the period from April, 1967 to December, 1968, he was independently approached by six different manufacturers who wished either to subcontract the finishing of fur garments or to import fur garments, but who wanted to avoid any difficulties which might otherwise result in doing so (Tr. 52-3, 63-5, 86, 107, 210). Those manufacturers, and the dates of their alleged initial approaches to him, were as follows:

April, 1967—Harry Hessel (Chateau Creations)

July, 1967—Sam Sherman (Sherman Bros.)

May, 1968—Karl Schwartzbaum (K. J. Schwartzbaum)

July, 1968—Sol Cohen (Corinna Furs)

July, 1968—Sam Baker (Breslin, Baker)

May, 1969—Daniel Ginsberg (Daniel Furs)

At trial, Glasser adamantly insisted on direct and cross-examination that the above noted firms were the only firms with which he had such dealings (Tr. 80, 84, quoted *infra*, pp. 19-20, fn.).

He further claimed that, following the initial request from each of the various manufacturers noted *supra*, he would get the approval of the appropriate Union leader (Tr. 63). He would then return and ask the manufacturer what the manufacturer wanted to pay (Tr. 67, 108). In no case was there any negotiation (Tr. 125, 138-40). He accepted whatever the manufacturer offered, and it was the manufacturer who set the spacing of payments (Tr. 113-114). Indeed, he never told the Union leader how much the manufacturer was paying. Instead, he kept up to half of the payment for himself, and paid the rest to the Union

leader without telling the Union leader that he was keeping anything (Tr. 69, 142-3). Similarly, the manufacturer was not advised as to the fact of the division (Tr. 115).

The union had a number of different officers, and Glasser claimed to have picked and chose as to which he paid. When he allegedly paid one, he made it a practice not to tell any of the others about the transaction (Tr. 122-3, 128).

As set forth under Point II, *infra*, he vacillated throughout the trial on the question of whether he had told the manufacturers, particularly Schwartzbaum, concerning the identity of the Union officer to whom he allegedly was making the payments. More often than not he appeared to take it for granted that the manufacturers knew he was accomplishing his objective by means of such payments.*

2. Glasser's Alleged Course of Dealings with Schwartzbaum

On direct examination, Glasser testified that in May, 1968, he met with Schwartzbaum who said: ". . . that he was importing furs and was giving out some contracting and could I see to it that he would have no headaches by doing so" (Tr. 53-4).

A few days later, Glasser returned to Schwartzbaum, and allegedly told him, "Jack, I have the okay from Charlie Hoff." Schwartzbaum then allegedly volunteered to pay Glasser $900 spread over three payments during the ensuing year (Tr. 66-7).

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* Other possibilities readily suggest themselves. An industry representative with 34 years of contacts might well have a sufficient base of friendship or influence to accomplish the task by merely asking for a favor. Additionally, Glasser might have been paid to keep *his* eyes closed. It was certainly not within the interest of the other members of the trade Association to have some firms undercutting them on overhead. In neither case would the statute here involved have been violated. See 29 U.S.C. § 186(c), *supra*, pp. 3-4.

Glasser alleged that during the latter conversation, Schwartzbaum gave him three one hundred dollar bills and after cashing one of the bills for smaller denominations: "I gave Mr. Hoff $150.00 in cash and I said one word to him, I said, 'Schwartzbaum' and that was the end of the conversation" (Tr. 68-69).

Thereafter, Schwartzbaum allegedly made similar payments in September or October, 1968, Christmas week of 1968,[1] June or July of 1969,[2] September or October of 1969,[3] and Christmas week of 1969[4] (Tr. 69-73). Their conversation at such times would be minimal: "Just very few words. He just would take out the $300.00, give it to me, and I would walk out" (Tr. 70).

3. The Deficiencies in Glasser's Trial Testimony

Glasser's obviously poor recollection at trial, whether actual or feigned, coupled with the conceded post-trial revelations of his perjury, are clearly material to the trial court's disposition of the motion for a new trial. We shall now illustrate his continuing retractions and contradictions.

When it was pointed out to Glasser that during the *Stofsky* trial he had failed to indicate that Schwartzbaum's objective was to engage in subcontracting, he responded, "I must have just left it out. It must have slipped my memory" (Tr. 185).[5] Glasser also acknowledged that, con-

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[1] Neither this nor the prior alleged payments were charged in the indictment.

[2] Count 9 of the indictment.

[3] Count 10 of the indictment.

[4] Count 11 of the indictment. Glasser testified that he had "no recollection of getting" any payment in 1970 (Tr. 153). For that reason, Count 12 of the indictment was dismissed by the court (Tr. 364).

[5] Contrary to his testimony at the present trial, Glasser testified at the former trial that Schwartzbaum's objective was to import furs from Canada (Tr. 183).

trary to his present testimony, he had testified before the Grand Jury that the defendant had made a payment to him in 1970 (Tr. 154-155).[1]

Glasser could not explain why, if the defendant was paying for protection, his was one of a small number of firms against whom a strike was called in May, 1969 for importing, or why the defendant had never complained to Glasser (or, for that matter, to Hoff), about the strike (Tr. 171-3).

While continuing to contend that, at the time of Schwartzbaum's initial request, he (i.e., Glasser) had gone to see Hoff, he retreated from his prior testimony (*supra*, p. 12), and claimed that he was not able to recall whether he ever spoke to Hoff in Schwartzbaum's behalf concerning contracting. His excuse for this change in his testimony was that, "these are events that took place five years or more ago" (Tr. 186). He also denied that the question of contracting had ever been discussed in his conversations with the prosecutor (Tr. 187, 189), or at the prior trial (Tr. 191).

He similarly withdrew from his claim (*supra*, p. 12), that he had told the defendant that money was being paid to Charles Hoff (Tr. 191-200).[2]

On redirect examination, over objection (see Point II, *infra*, p. 32), the prosecutor was permitted to show the witness the prosecutor's own notes, never before seen by the

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[1] He doubted the accuracy of the Grand Jury transcript (Tr. 157).

[2] As can be seen, the questioning of Glasser on this issue was extended. He repeatedly testified that he did not believe that his prior testimony or his prior discussions with the prosecutors, *particularly the one just prior to trial*, had included any reference to a claim that Schwartzbaum knew the money was going to Hoff (Tr. 194, 196).

witness, allegedly taken during an interview a few days before trial (Tr. 222-228; see Gov. Exh. 3511 at A. 21). The prosecutor was permitted to point out to the witness a specific paragraph of those notes. Upon reading the prosecutor's conclusory written assertion, contained in that paragraph, that Glasser had mentioned Hoff to Schwartzbaum, Glasser again reversed his testimony and claimed: "I came back to Mr. Schwartzbaum and I said, 'I have had a conversation with Mr. Hoff. He has said okay, you can go ahead and do it' " (Tr. 229).

On recross examination, Glasser admitted that since "there are so many things . . . I had no recollection" until seeing the memorandum (Tr. 230). He also admitted that he did not recall anyone taking notes during the meeting of which Government Exhibit 3511 was supposed to be a memorandum (Tr. 235). Modifying his testimony even further, he claimed that he now recalled that he had "volunteered the information" concerning the mention of Hoff to Schwartzbaum (Tr. 237). He acknowledged that in personal notes that he, himself, had kept, there was no indication of such a notification to Schwartzbaum (Tr. 239), nor had he made any such claim in prior interviews with prosecutors or in his prior testimony before the Grand Jury (Tr. 239).

D. The Jaffee Incident *

At the time of trial, Harry Jaffee was a sixty-nine year old retired business agent of the Furriers Union (Tr. 260). He testified at the instant trial under a grant of immunity (Tr. 263).

Glasser testified that in October or November, 1969, he and Jaffee were visiting the Schwartzbaum shop when Jaffee

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* Jaffee's testimony was received over defense objections that it concerned a crime or crimes not charged in the indictment and, additionally, it was hearsay evidence not based upon anything Jaffee witnessed the defendant say or do (Tr. 241-248).

started inquiring as to the origin of certain furs he saw there. Glasser allegedly gave $100.00 to Jaffee so as to terminate this line of inquiry. It was Glasser's contention that he obtained this $100.00 (not the subject of any count of this indictment) from the defendant (Tr. 76-78, 179).

Jaffee testified that Glasser had paid him $50.00 with a request to ignore anything he might see at the Schwartzbaum shop, but had no knowledge as to whether Schwartzbaum was aware of the payment (Tr. 267-293).

E. The Alleged Admission

In March, 1973, the Schwartzbaum firm carried a $400,000 line of credit with Chase Manhattan Bank for operating capital. The loan officer in charge of the loan was Albert Chambers (Tr. 307-309). At or about that time, an indictment was filed against the defendant which was later superseded by the instant indictment, and the matter received some newspaper publicity (Tr. 310). On April 2, 1973, Schwartzbaum contacted Chambers and asked him to come to the Schwartzbaum firm to discuss the indictment and various other unrelated matters. They met on the following day (Tr. 310). According to Chambers, the conversation went as follows:

> "He said that in view of that newspaper article and the other matters, he thought we were entitled to the facts surrounding it and wanted to assure us that it had no adverse effect on his company, whatever the outcome might be.
>
> * * * * *
>
> "We had quite a discussion and it led up to the fact, he mentioned that he had paid $600.00, another individual $150.00, and the total payments were $1,200.00" (Tr. 311).

During the course of the meeting, Chambers took notes "relative to the amounts mentioned only" and upon returning to his office, he dictated a "memorandum outlining the whole discussion" (Tr. 311; Gov. Exh. 4 for identification).

According to Chambers, the defendant said "he couldn't understand the reasoning for the indictment because of the small amounts involved" and "he felt they were using [him] and the others to get at the larger payers and to the union officials involved" (Tr. 314).

A portion of Chambers' memorandum states: "Schwartzbaum testified before the grand jury on Monday, April 2nd, and along with three other defendants, was released on his own recognizance pending the trial." At trial, Chambers acknowledged that he had misapprehended the facts (Tr. 322), and that his misapprehension had been pointed out to him by the prosecutor during an interview (Tr. 324). Schwartzbaum had not testified before the grand jury, but rather had been arraigned upon the indictment (Tr. 330, 343).

Although it is Chambers' recollection that the defendant was "very much at ease" and "indicated complete confidence" (Tr. 327), it was also his recollection that the defendant had said that he had, in fact, paid the monies noted in the indictment (Tr. 345, 348-9). He asserted, however, that this latter recollection was as strong as his recollection that the defendant had told him that he had appeared before the grand jury (Tr. 345).

F. The Defense Case

The defendant's wife, Ruth Schwartzbaum, testified that in 1968 and 1969 she and her husband took their vacation during the Christmas holidays at the Doral Country Club in Miami, Florida. On both occasions, they left New York

on December 20 or December 21, and did not return for eight to ten days (Tr. 373-377). Her testimony was intended to establish that Schwartzbaum could not have made the payments which Glasser alleged were made during the Christmas weeks of those years (*supra*, p. 13).

In view of Glasser's surprising change of testimony as to whether he had informed the defendant that monies were being paid to Hoff (*supra* pp. 14-15), the defense sought to call to the stand Assistant United States Attorney Fryman, one of the two prosecuotrs who were trying the instant case. The reason for the request was that Mr. Fryman had authored government exhibit 3511 just a few days before trial, and it was the showing of that exhibit to Glasser, over defense objection, that caused him to change his testimony on redirect examination. The trial court refused to permit the defense to call Mr. Fryman (Tr. 378-387).

ARGUMENT

POINT I

The defendant was entitled to a new trial when, following trial, it was established that Glasser had perjured himself with regard to material facts.

Alternatively, the defendant is entitled to a hearing at which he would have the opportunity to: 1) examine Glasser with regard to his perjurious testimony and matters related thereto; and 2) establish to what extent the prosecution knew or should have known, at the time of trial, of the existence of the newly discovered evidence.

An allegedly detailed government memorandum concerning Glasser's post-trial admissions should have been provided to the defense rather than sealed by the court.

1. The Underlying Facts

At the instant trial, under direct examination by the prosecution, Glasser unequivocally testified that, during the time period relevant to this indictment, he received payments, similar to those here involved, from only five other manufacturers.* His share of the payments, according to his testimony, came to a total of $5,043.00 (A. 49-50).

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* On *direct* examination by the government, Glasser testified as follows:

> "Q. Mr. Glasser, you mentioned that in addition to the payments from Mr. Schwartzbaum which you passed on to Mr. Hoff, you had also transmitted payments to Mr. Hoff from I believe two other firms, Sherman Bros. and Chateau. *"Have you ever accepted payments from any other fur manufacturer which you transmitted to any official of the furriers union?* A. Yes, I did.

[Footnote continued on following page]

At the prior trial of the union officials, counsel for defendants had subpoenaed bank records which led to the disclosure that Glasser had financial assets in excess of One Hundred Thousand ($100,000.00) Dollars. Glasser explained at that trial that the bulk of his resources were derived from an inheritance which had been received by his wife. Although an examination of Surrogate Court records cast doubt upon that assertion, counsel at the prior trial were unable to develop anything of value from these disclosures. As it turned out, the bank's response to the subpoenas had not produced those records which would have revealed to counsel that, during the three and a half year period covered by this indictment, Glasser had made large and frequent cash deposits to his various bank accounts (A. 114-5, 118-20).

At the instant trial, Glasser testified that his net salary during the period covered by the indictment was $174.00 per week (Tr. 150). He further testified that he did not receive cash gifts from other fur manufacturers (Tr. 151). Efforts to ascertain whether he was a gambler were met with an unequivocal denial. Indeed, Glasser denied that he had ever been to the racetrack (Tr. 153).

[Footnote continued from prior page]

> "Q. *What firms were those?* A. There was a firm called Corrina Furs, there was Breslin, Baker, there is one other now and I just can't remember his name. I just can't recall. There was another one. *There were five firms all together.*" (Tr. 80) [Emphasis added]

Similarly, on cross examination, Glasser testified:

> "Q. At that time, when you were requesting immunity from Mr. Hinckley, *how many crimes had you committed?* A. That I committed?
>
> "Q. You. How many? A. At least five.
>
> "Q. *Could it have been ten?* A. *No. Five.*
>
> "Q. *Five crimes?* A. *Yes.*" (Tr. 84) [Emphasis added]

It was immediately made clear that, in giving these responses, Glasser considered his course of dealings with each manufacturer to be a separate crime (Tr. 40-1), regardless of the number of payments involved (Tr. 85).

Following the instant trial (A. 45), defense counsel learned about the bank records which revealed Glasser's cash deposits. Those records established that, during the three and a half year period covered by the indictment, Glasser's total *cash* deposits amounted to $56,701.05 (A. 76). That disclosure prompted both the defendant herein and the defendants in the *Stofsky* case to make a motion for a new trial grounded upon newly discovered evidence (A. 44-76, 107). In response to the motions, the government interviewed Glasser and his wife (A. 79). At first, they claimed that the cash deposits resulted from a sale of Mrs. Glasser's jewelry (A. 116-7); however, Glasser eventually admitted that approximately half of the almost $57,000 in deposits were the proceeds of payments made by other fur manufacturers. He claimed that the balance of the cash deposits resulted from various legitimate transactions, including the sale of his wife's jewelry, Christmas and vacation gifts from manufacturers, and miscellaneous commissions (A. 79-82). No documentation appears to have been produced with regard to these latter alleged sources of income (A. 77, *et seq.*). He also admitted that he had gambled in a casino in Puerto Rico, and, contrary to his unequivocal testimony at the present trial, he had been to racetracks on various occasions (A. 83-7).

The government incorporated all of the above admissions of perjury and other information into a reply affidavit executed by government counsel (A. 77 *et seq.*). In addition, the government filed with the court a document * allegedly detailing the facts concerning Glasser's payments from other manufacturers. The defense was not provided with a copy of the latter document, and, at the request of the government, the court placed it under seal (A. 116-7). The government did not include in its reply any affidavit ex-

* The Government has characterized the document as being an affidavit (A. 82); the District Court has characterized it as being a memorandum (A. 116).

ecuted by Glasser with regard to the newly discovered evidence. Likewise, no documentation was produced with regard to Glasser's claim that a part of his cash deposits were derived from legitimate sources, nor did the government's response indicate whether Glasser was questioned with regard to what percentage, if any, of the payments he received was expended by him rather than put in the bank.

Instead, the Government chose to paraphrase a series of patently incredible explanations, allegedly offered to Government counsel by Glasser and his wife, for the concededly false testimony (A. 80-3).

Appellant respectfully requests that this Court grant permission to his attorneys to examine the sealed document, so as to determine whether it contains additional information which would support the motion for a new trial. When it is realized that the Government, on direct examination, asked Glasser to reveal the very information contained in the sealed exhibit, and it was only his perjurious responses that blocked public testimony on the point, it can readily be seen that no proper basis exists for the document to be sealed.

2. The Value of the Newly Discovered Evidence

It is conceded by the Government and found by the District Court that the newly discovered evidence, and Glasser's admissions with regard thereto, establishes that he perjured himself at the instant trial concerning the extent of his illicit dealings and the income he derived therefrom. Additionally, if his claims concerning thousands of dollars in holiday cash gifts from various manufacturers are true, then he perjured himself in denying, at the instant trial, that he received such gifts. Finally, his admissions with regard to gambling establish that he perjured himself in denying that he engaged in such activity.

At the instant trial, it would have been of enormous value to the defense to establish to the jury that all during

the time that he appeared to be cooperating with the government under a grant of transactional immunity, he was, in fact, making false statements to government agents and perjurying himself before grand juries and at trials. Such a showing of perjury would have been substantially more than a simple attack upon Glasser's general credibility. It would have gone directly to the course of dealings which led to the instant prosecution.

The same evidence would have borne directly upon the most crucial factual issues in this case: 1) Did Glasser keep all of the alleged payments for himself, rather than give any of it to Union officials, and 2) Was Glasser actually capable of remembering the substance of his conversations with the defendant particularly with regard to whether he ever advised the defendant that payments were being made to a union officer? As established in Point II, *infra*, p. 32, the latter issue presented the ultimate line of defense. Finally, the newly discovered evidence presented the genuine issue of whether, at the time of the instant trial, the government, knew or should have known facts concerning Glasser's financial dealings which should have been disclosed to the defense.

It is clear that specific instances of conduct of a witness, even though not the subject of conviction, are proper subjects of cross examination "if clearly probative of truthfulness or untruthfulness and not remote in time", *Proposed Rules of Evidence for the United States Courts and Magistrates, Rule* 608[b]. A *fortiori,* this would be the case where, as here, the witness has admitted his perjuries to those who vouch for his credibility by using him as a witness and where, his perjury concerned the course of conduct under litigation. As stated in *Wigmore on Evidence,* Vol. III-A, § 957:

> "*Willingness to swear falsely.* A willingness to swear falsely is beyond any question admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence."

In *Napue* v. *Illinois*, 360 U.S. 264 (1959), the Court held:

> "The jury's estimate of the truthfulness and reliability of the government witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend" (360 U.S. at 269).

It has been widely recognized that cross-examination as to the "trait of veracity" and as to "a propensity to disregard the obligation of an oath" is always material to the trial of a criminal case, unlike other types of impeachment which go merely to the general character of a witness, *United States* v. *Provo*, 215 F.2d 531, 537 (2d Cir., 1954). *See also*: *Simon* v. *United States*, 123 F.2d 80, 85 (4th Cir., 1941); *United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa., 1965); *Lyda* v. *United States*, 321 F.2d 788, 793 (9th Cir., 1963); *United States* v. *Segelman*, 83 F. Supp. 890, 893 (W.D. Pa., 1949).

Indeed, the Supreme Court has held that previously undisclosed evidence of perjury by a government witness was so material to the integrity of the fact-finding process that a new trial was required, even where there was no evidence of suppression by the prosecution, *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Communist Party* v. *Subversive Activities Board*, 351 U.S. 115 (1956).

In *Mesarosh*, evidence of incidents of suspected perjury by the government witness was discovered after the trial and conviction of the defendant. All but one of the incidents of suspected perjury by the government witness had occurred *after* the trial, and the one pretrial example of perjury had occurred in a State court proceeding of which the government concededly had no knowledge at the time of trial. Nevertheless, it was held that a new trial was required in view of the fact that the confessed perjuror was

a government informer and professional witness. Under such circumstances, "the integrity of a criminal trial in the Federal Courts" is involved (352 U.S. at 3). We find no distinction of substance between Glasser and the witness in *Mesarosh*. By its grant of transactional immunity to him, and by its use of him to secure indictments against a substantial number of individuals, the government has vouched for him to an extent substantially beyond that normally accorded to a trial witness. That Glasser may have deceived the government does not diminish the pollution which he introduced into the fact-finding process, but rather intensifies it.

As already noted, however, the newly discovered evidence goes beyond the issue of Glasser's willingness to tell the truth. It goes directly to the substance of his testimony. Was Glasser capable of recalling what he had told the defendant, i.e., capable of distinguishing his dealings with the other defendants from his dealings with the numerous other manufacturers? If the cash receipts *which he banked* were the results of dealings with other manufacturers, as is admitted to a substantial extent, then simple mathematics indicates that he was probably dealing with at least eleven times the number of manufacturers to which he admitted at the instant trial. Applying simple mathematics, it is, therefore, likely that Glasser was dealing with more than sixty-six different manufacturers during the three and a half year period that he was allegedly dealing with the defendant.*

Glasser's memory problems at trial were attributed merely to the passage of time. Nevertheless, he eventually alleged that he had specific recollections concerning his con-

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* He admitted to dealings with six manufacturers and receipt from them of approximately $5,000. He is now shown to have made cash deposits of almost $58,000. Putting aside the question of what he spent and did not bank, the number of manufacturers indicated in the text represents the proportional increase.

versations with the defendant. If the newly discovered evidence would have been available to the defense at trial, it would clearly have supported the defense contention that Glasser could not reliably recall what he had told or not told to the defendant. The basis and reliability of a witness' ability to recall goes directly to the substance of his testimony. Since, in the present case, it was the only line of defense available, it certainly would have been exploited to its fullest extent. See, *Wigmore on Evidence,* Vol. III-A, §§ 993-995.

In *United States* v. *Polisi,* 416 F.2d 573 (2d Cir. 1969), this Court held:

> "Where the conviction is shown to be based even in part upon perjured testimony, however, a court will not stop to inquire as to the precise effect of the perjury, but will order a new trial if without the perjury the jury might not have convicted. Mesarosh v. United States, 352 U.S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956); Larrison v. United States, 24 F.2d 82 (7th Cir. 1928)." (416 F.2d at 577).

Particularly in view of the fact that Glasser's perjury went directly to the substance of his ability to testify accurately, and in view of the dramatic impact which his demonstrated prior perjuries would have had upon the jury, the holding of *Polisi* requires that the conviction be reversed and a new trial be granted.

3. The Opinion of the District Court Denying the ɔtion

As noted, *supra,* the new trial motions of the *Stofsky* defendants and of the defendant herein were pending before the district court at the same time. On June 12, 1974, the court filed a lengthy opinion denying the *Stofsky* motion (A. 107). Thereafter, on June 24, 1974, the court en-

dorsed the following memorandum upon the motion papers of the defendant herein:

> "The motion herein for a new trial based on allegedly newly discovered evidence is hereby denied. The reasons for the denial are substantially those contained in a memorandum opinion filed by this court on June 12, 1974 denying a similar motion in United States v. Stofsky, et al., 73 Cr. 614. Moreover, in this court's view, the defendant has failed to satisfy the threshold requirement of demonstrating that the purported newly discovered evidence could not have been with due diligence discovered either before the trial or at the latest at the trial.
>
> "The defendant's request that this court reconsider its first motion for a new trial in light of the allegedly newly discovered evidence is also denied" (A. 106).

In its opinion denying the *Stofsky* motion, the court found that Glasser had clearly perjured himself with regard to the amounts of income which he had derived from his course of dealngs with fur manufacturers (A. 117-8). However, noting that the defendants in *Stofsky* were the individuals who allegedly shared with Glasser in the payments received from manufacturers, the court concluded, ". . . that no defense counsel would actually attempt to use the evidence of the cash deposits as substantive support for the defendants' theory. The risk inherent in exposing the jury to Glasser's damaging explanation would be great" (A. 126). To the same effect, elsewhere in its opinion, the court noted:

> "* * * It is possible, of course, that counsel could attempt to exploit this entire episode so as to seriously damage Glasser's credibility, but, again, it is difficult to imagine how it might be done without raising the spectre of a far wider, broader scheme involving these defendants" (A. 128).

In light of these considerations, and the other evidence in the case against the *Stofsky* defendants, the court denied the motion upon the ground that it is not probable that a jury would have reached a different verdict if the newly discovered evidence had been in the possession of defense counsel (A. 130).

4. The Factors which Distinguish the Instant Case from the Stofsky Case

While it may be true that counsel representing union officials who are charged in sharing such payments, would be hesitant to elicit from Glasser the allegation that he had shared much greater amounts involving many other manufacturers with the defendants on trial, that obstacle is not present in the instant case. To the contrary, as demonstrated *supra*, pp. 22-6, it was fully within Schwartzbaum's interest to establish that Glasser would not likely remember his conversations with Schwartzbaum due to the numerous transactions in which Glasser was engaged. Having alleged that the receipt of payments from six manufacturers required more than forty meetings with *those* manufacturers, the number of meetings with sixty-six manufacturers, on the same subject, would necessarily have amounted to hundreds.

It is clear, therefore, that the strategic consideration and evidentiary value of the newly discovered evidence in the *Stofsky* case was so different as to make the district court's analysis inapplicable with regard to the instant case. For that reason, the deference normally accorded to factual findings by the district court on such motions, should not be accorded here.

5. The Alleged Lack of Due Diligence

In response to the *Stofsky* motion, the government argued that the motion should be denied since, at the time of trial, the defense had in its possession information which, if diligently pursued, would have uncovered the fact that

Glasser had made substantial *cash* deposits during the three and a half year period in question (A. 118-20). In declining to find a lack of due diligence, the court noted that the bank records which had been delivered to the defense had not indicated the fact that Glasser's deposits had been made in cash—the factor which, concededly, was the critical key to the discovery of the newly discovered evidence. Thus, the court held that: "this court is not prepared to say that trial counsel in a complex, demanding case is bound to turn every key at precisely the right moment in order to meet the requirements for a new trial motion" (A. 119).

In the present case, the defense was at an even greater disadvantage than counsel in the *Stofsky* case. An examination of the *Stofsky* transcript would indicate to any reasonable person that the "key" had been turned in the prior trial, but had not opened the door. It appeared as though both defense counsel and the government in the prior trial had had access to the bank records, and that Glasser had been interrogated to the fullest extent imaginable, all to no avail. Under these circumstances, it is respectfully submitted, neither the defendant nor his attorney can be faulted for failing to follow the same path which had so unsuccessfully been pursued in the prior trial. That path had been blocked by Glasser's perjury as well as that of Glasser's wife* and had been inadvertently hidden by the bank's failure to reveal the additional records which it possessed.

It is certainly true that, if anything, the government had in its possession far greater direct knowledge of Glasser's finances than did defense counsel. Indeed, the chief prosecutor at the *Stofsky* trial, Mr. Sabetta, was one of the two attorneys who represented the government throughout the instant trial. His assistant during that trial, Mr. Fryman, was the chief prosecutor at the instant trial. If the defense herein should have been alerted to the

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* See the appendix filed upon the appeal in the *Stofsky* case at A. 151-6, 178-9, 180-2.

evidentiary possibility of the bank records, that conclusion applies, *a fortiori,* to the prosecution. Yet, there is no indication whatsoever that the prosecution ever raised the subject with defense counsel.

The trial of the instant case makes clear that defense counsel certainly did not recognize that such potential evidence existed. If he had such a realization, there would have been no conceivable reason why he would not have pursued and used it. In contrast, the Government tendered the witness and vouched for his credibility. Government counsel had an intimate, first hand knowledge of the facts far surpassing that of defense counsel herein. Moreover, the importance of the origin of Glasser's fortune had so clearly been driven home to one of the prosecutors that, in urging the Court to permit Mrs. Glasser to testify at the *Stofsky* trial as to the source of that fortune, he argued:

> "Mr. Sabetta: Your Honor, we think that the issue of the money is a central one in this case." (*Stofsky* Appendix, filed in this Court, at 178a).

Mrs. Glasser then went on to thoroughly perjure herself, thus further insulating Glasser's perjury from detection by the defense.

During and following the *Stofsky* trial, Government counsel had full opportunity to pursue these facts to their ultimate conclusion in the course of their private questioning sessions with Glasser. The Government affidavit in response to the new trial motion is silent on the point, and there is, thus, no information presently available as to what, if anything, the Government actually learned from Glasser, from the bank records or from counsel in the *Stofsky* case prior to the termination of the instant trial, beyond that which is indicated on the face of the *Stofsky* record.

It is respectfully submitted that the district court's holding of a lack of due diligence on the part of trial counsel herein has no basis when realistically viewed against the facts.

6. The Defense was Entitled, at Least, to an Evidentiary Hearing with Regard to the Motion for a New Trial

As noted, *supra,* the record is silent as to what, if any, information concerning Glasser's finances was in the possession of the prosecution prior to and during the instant trial beyond that which is revealed by the *Stofsky* record. If, during that period, the prosecution had uncovered evidence "whose high value to the defense could not have escaped the prosecutor's attention" and had failed to turn such evidence over to the defense, then a clear case of suppression of evidence would be presented. Under those circumstances, the criteria to be applied in determining whether a new trial should be granted have a far lower threshold than would otherwise be the case, *United States* v. *Polisi,* 416 F.2d 573; *United States* v. *Keogh,* 391 F.2d 138 (2nd Cir., 1968). It is respectfully submitted that a hearing should have been accorded to the defense so that the extent and nature of the government's knowledge might be ascertained. In the absence of such a hearing, the record is not sufficient to provide either the district court or this court with a means of determining which standard ought be applied, *United States* v. *Keogh,* 391 F.2d at 149.

As it presently stands, the record only contains the assertions of the trial prosecutor concerning the facts revealed and confessed to him by Glasser. The defense has had no opportunity to examine Glasser under oath for the purpose of determining whether he has fully revealed the extent of his perjury, the extent of his dealings with other manufacturers, and the extent to which Glasser's testimony may have been deliberately colored or unavoidably obscured due to Glasser's desire to prevent disclosure of his perjuries and his other allegedly criminal conduct.

In resolving the motion purely upon the hearsay affidavit of the prosecutor, the district court committed clear error and the case should be remanded for a hearing, *United States* v. *Keogh, supra. See also*: *Berger* v. *United States,* 295 U.S. 78 (1974); *United States* v. *Zbrowski,* 271 F.2d 661, 668 (2d Cir. 1959); *Napue* v. *Illinois,* 360 U.S. 264, 269-270 (1959); *Dunn* v. *United States,* 245 F.2d 407 (6th Cir. 1957); *Smith* v. *United States,* 259 F.2d 125 (9th Cir. 1958); *United States* v. *Derosier,* 229 F.2d 599 (3rd Cir. 1956); *James* v. *United States,* 175 F.2d 769 (5th Cir. 1949).

POINT II

The trial court should not have permitted the prosecution to "refresh" Glasser's recollection by means of a memorandum prepared by government counsel just a few days before trial.

The error was compounded and the defendant's constitutional right to call witnesses was violated by the court's further ruling which prohibited the defense from calling one of the trial prosecutors as a witness with regard to the facts and circumstances surrounding the preparation of the memorandum in question.

1. The Underlying Facts

Principal government counsel at the instant trial was assistant United States Attorney Thomas Fryman. He was assisted throughout the trial by assistant United States Attorney John C. Sabetta. Mr. Sabetta had an intimate knowledge of the facts of this case. He had been the chief prosecutor at the *Stofsky* trial and Glasser had been one of his witnesses. Indeed, at the *Stofsky* trial, Glasser had testified at length concerning the facts of the instant case.

A few days prior to trial, both Mr. Fryman and Mr. Sabetta interviewed Glasser and his wife. Mr. Fryman allegedly later reduced his impressions of that interview to

a two-page memorandum (Gov. Exh. 3511 A. 28). The memorandum is not in question and answer form, but rather, is a narrative, by Fryman, purporting to indicate the substance of what Glasser's testimony would be. The critical sentence in the memorandum appears in the last paragraph of the first page:

> "Glasser told Schwartzbaum that Hoff said okay." (A. 28)

On direct examination, Glasser testified that, after the defendant told him he did not wish to have any headaches growing out of the practice of subcontracting, Glasser cleared the matter with Hoff and then returned to the defendant and: "I said to him, 'Mr. Hoff said it would be okay'" (Tr. 67).

On cross-examination, it soon became clear that Glasser was an imprecise witness who frequently recited his assumptions as statements of fact. This is well illustrated by his following testimony with regard to payments received from a different manufacturer (Baker):

> "Q. What did you say [to Baker]? A. I told him I would discuss it with Mr. Hoff and let him know.
>
> "Q. Did you mention the name of Mr. Hoff to Mr. Baker? A. No. That was what I had in my mind.
>
> "Q. I am not asking you what you had in your mind. Did you mention to Mr. Baker the name that you were going to see—— A. No, I did not" (Tr. 129-130).

The defense thus sought to show that Glasser had not told the defendant that a payment was being made to Hoff. If there were no such conversation, the jury could well conclude that the defendant had no understanding that payments were being made to union officials. With this objective, defense counsel cross examined Glasser as follows:

"Q. Mr. Glasser, you testified yesterday that you actually told Mr. Schwartzbaum the name of the union official who gave the okay? A. I don't know if I did tell it to him. I don't know.

"Q. What's your recollection today? A. As I said, all of my testimony is my best recollection of events that took place from five, six years ago, and I am giving you my best recollection of these events. That's the best I can do.

"Q. In giving us your best recollection, you could be wrong in many respects, is that correct? A. I could be mistaken.

* * * * *

"Q. Let's find out about this respect: did you ever testify at any time, under oath, that you told Mr. Schwartzbaum the name of the union official? A. I don't know if I did. I cannot recall that I testified to it or that I didn't.

"Q. And today you are not even sure as to whether or not you had ever mentioned him? A. To Mr. Schwartzbaum specifically, Mr. Hoff?

"Q. Yes. A. No, I am not sure that I did.

"Q. And it could be that you didn't tell it to him? A. Possibly that I didn't tell it to him, that it was Mr. Hoff, yes" (Tr. 191-193).

Glasser went on to testify that he had no recollection of previously claiming or testifying that he had told the defendant that payments were being made to Hoff (Tr. 193-201).

On redirect examination, the prosecutor asked Glasser whether Glasser recalled "everything that was said about Mr. Schwartzbaum" during the interview which had occurred a few days prior to trial (Tr. 222). Glasser's response was:

> "Well, outside of the fact that he was not going to come up because of illness, I don't recall any discussion on Mr. Schwartzbaum at that particular time."

At that point, the prosecutor sought to display to the witness Government Exhibit 3511 for the purpose of ascertaining whether it "refreshes your recollection about what was said in that conference" (Tr. 222).

The defense requested a voir dire as to the document, and established that the witness had never seen the document before (Tr. 222-223). Upon that ground, and the additional ground that it had been prepared by the prosecutor, the court sustained a defense objection to the use of the document (Tr. 223). However, the point was pressed at a bench conference, and, following an examination of *McCormick on Evidence*, the court concluded as follows:

> "As you might imagine, they argue both sides of it and cite authorities for both sides and say that it is in the discretion of the court. McCormick seems to say that it is—he says, 'it would seem that this liberality of practice is the wiser solution,' meaning to simply follow the procedure of using anything that might refresh his memory, letting him read it, asking the question as to whether it does, and then going on from there" (Tr. 225).

The court thereupon reversed its prior ruling, and permitted government counsel to exhibit the document to the witness and to point to the very paragraph which contained Government counsel's own conclusory assertion (Tr. 228).

Following his examination of the paragraph, Glasser testified: "I came back to Mr. Schwartzbaum and I said, I have had a conversation with Mr. Hoff. He has said okay. You can go ahead and do it" (Tr. 229).

At the conclusion of the government's case, defense counsel sought to call Mr. Fryman as a witness for the purpose of having him testify as to the circumstances under which Government Exhibit 3511 had been prepared (Tr. 378-80).

Mr. Fryman responded:

> "* * * I agree with Mr. Esbitt. It is a most unusual procedure that he is seeking to go through here, *but I have no qualms*, if he—" (Tr. 380) [emphasis added].

At that point, Mr. Fryman was interrupted by Mr. Sabetta, who sought to resolve the matter by means of a stipulation which would be read to the jury. The offer was declined (Tr. 380-4).

Thereafter, Mr. Fryman volunteered as follows:

> "Mr. Fryman: I suppose if Mr. Esbitt questions me on direct, will Mr. Sabetta have the right to pursue cross and to put in exhibits, your Honor?
>
> "Mr. Esbitt: Of course.
>
> "The Court: If it develops that you take the stand, yes.
>
> "Mr. Esbitt: *I have no objection to Mr. Sabetta taking over the prosecution.*" [Emphasis added.]

Thereafter, the court simply announced: "I am going to deny the request . . . in toto. You have your exception, of course" (Tr. 387).

Following the trial, the defense filed a motion to set aside the verdict predicated upon the improper use of the memorandum and the denial of the defense request to call Mr. Fryman as a witness (A. 6).

In response to the defense motion, Mr. Fryman submitted an affidavit in which he reviewed the discussion which he and Mr. Sabetta had had with Glasser a few days prior to trial:

> " * * * With respect to his second meeting with Mr. Schwartzbaum, I asked Mr. Glasser what he said. He replied that he had told Mr. Schwartzbaum that Mr. Hoff said okay. I was aware that this

aspect of that second meeting had not been brought out in Mr. Glasser's prior testimony, and I asked him if he was certain that he had mentioned Mr. Hoff's name to Mr. Schwartzbaum at that meeting. Mr. Glasser again replied that he had told Mr. Schwartzbaum that Hoff said okay. He repeated this answer to a further question by Mr. Sabetta about what he had said in that second meeting with Mr. Schwartzbaum.

"Neither Mr. Sabetta nor I made any notes during this meeting with Mr. Glasser. During the evening of Tuesday, March 26th, I typed a draft of a memorandum concerning our meeting with Mr. Glasser. A copy of the draft which I typed is attached hereto as Exhibit 1. The following morning I gave the draft to Mr. Sabetta to review. Later that day, Mr. Sabetta returned the draft to me and stated that it accurately reflected his recollection of our meeting with Mr. Glasser. I then had the draft retyped, and a copy of the final memorandum was marked as Government exhibit 3511 and given to Mr. Schwartzbaum's counsel on Thursday, March 28th, 1974" (A. 23-6).

Also submitted by the government was Mr. Sabetta's affidavit which stated that "Mr. Glasser also said that at some point in time thereafter he told defendant Schwartzbaum that Mr. Charles Hoff had agreed to the arrangement" (A. 31).

The trial court denied the motion in an opinion (A. 38).

2. The Memorandum Should Not Have Been Used to "Refresh" Glasser's Recollection

As noted in *Wigmore on Evidence*, Vol. IV, §§ 758-9, the general principle is that any writing may be used to stimulate and revive the recollection of a witness, even if

that writing was not made by the witness himself. However, as noted in *Wigmore*:

> "Since the narration or communication should represent actual recollection (§ 766, *infra*), it becomes necessary to forbid the use of various artificial written aids capable of misuse so as to put into the witness' mouth a story which is in effect fictitious and corresponds to no actual recollection. Under pretext of stimulating the witness' recollection, if an actual present recollection exists, of the quality sufficient for testimony (§ 726, *supra*), the process and the result are legitimate. *But these expedients for stimulating recollection may be so misused that the witness puts before the court what purports to be but is not in fact his recollection and knowledge.* Such a result cannot be accepted as testimony; and it is to prevent this misuse of expedients legitimate enough in themselves that some restriction may be necessary. * * *" [Emphasis added]

Wigmore continues:

> "It follows, therefore, *that any writing whatever is eligible for use,* while on the other hand, *any writing whatever may, in the circumstances, become improper.* * * *" [Emphasis in original]

We respectfully submit that the circumstances under which this memorandum was created, particularly in view of Glasser's obvious predisposition to suggestion, required that this memorandum not be used for the purpose of refreshing recollection.

One of the factors which ought be considered in determining whether a document should be used for the purpose of refreshing recollection is whether the document was prepared in contemplation of the witness' testimony at the proceeding in question, and another is whether it was prepared by someone other than the witness:

> "Nevertheless, though the witness' authorship is not essential to the use of the paper, it is obvious that papers prepared by others may, under circumstances specially dangerous, be excluded from use." (*Wigmore, supra,* § 759, p. 131; *see also* cases and examples there cited).

See also: *Sayer* v. *Waystaff*, 5 Beav. 462, 466 (1842), in which the court said: "I cannot consider it a right thing for any solicitor to prepare depositions for a witness before examination. . . . If he goes before him [the examiner] with the depositions already prepared, it is reason for suppressing them"; *Detroit Life Insurance Co.* v. *Linsenmeir*, 241 Mich. 608, 217 N.W. 919 (1928); *In Re Osbon's Estate*, 205 Minn. 419, 286 N.W. 306 (1936); *Bridges* v. *Candland*, 88 Utah 373, 54 P.2d 842 (1936); *NLRB* v. *Federal Dairy Company*, 297 F.2d 487, 488-9 (1st Cir., 1962).

The obligation of the trial judge in determining whether a document may properly be used to refresh recollection was succinctly stated in *Thompson* v. *United States*, 342 F.2d 137, 140 (5th Cir., 1965):

> "The trial judge has a duty to prevent a witness from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection."

To the same effect, *Delaney* v. *United States*, 77 F.2d 916, 917 (3rd Cir., 1935).

In the present case, the witness had numerous opportunities, during prior interviews and sworn testimony, to state that he had informed the defendant of the payments to Hoff. He did not do so. In his affidavit in response to the defense post-trial motion, the prosecutor, himself, indicated that this new assertion by Glasser was unexpected and deviated from his prior story (*supra,* p. 36).

In view of the fact that the memorandum was created just a few days before trial, and approximately six years after the actual event with which Glasser's testimony was concerned, the procedure followed in the instant case was hardly calculated to revive an actual independent recollection of the witness. If Mr. Fryman did not have the memorandum in question, can it be doubted that he would not have been permitted, during the course of Glasser's testimony, to write on a piece of paper "Glasser told me the other day that . . .", and then hand the paper up to the witness under the guise of refreshing his recollection. The procedure followed in the present case was, in substance, no different. As noted in *NLRB* v. *Federal Dairy Company*, *supra*, 297 F.2d at 489, "one may well ask why there should be strictures against leading questions if a witness is free to have a prepared answer before him in any event."

It is respectfully submitted that the defense objection to the use of the memorandum should have been sustained.

3. The Defense was Entitled to Call One of the Prosecutors as a Witness

In view of the substantial effect which Glasser's "refreshed" testimony had upon the evidence in this case, the defense should clearly have been entitled to explore before the jury every aspect of the circumstances leading to his change of testimony.

In its post-trial memorandum-opinion, the trial court explained its refusal to permit the calling of the prosecutor upon the following rationale:

> "The court may properly refuse to permit defense counsel to call the prosecutor as a witness if 'it does not believe that "he possesses information vital to the defense"' United States v. Newman, 476 F.2d 733, 738 (3rd Cir., 1973). A showing should also be made that the information is not otherwise obtain-

able. United States v. Fiorello, 376 F.2d 180, 185 (2nd Cir. 1967).

> "Here defense counsel had means at his disposal —either by cross-examination or by simply use of the memorandum itself—to seek to establish the contradiction between Glasser's testimony and the terms of the memorandum. In this fashion, Glasser's credibility with respect to these matters would clearly be in issue. It follows, therefore, that there was no need to put the prosecutor on the stand in order to establish this.
>
> "The issues raised pertaining to the preparation of the document and the circumstances surrounding the questions and answers included therein were, in this court's opinion, collateral to the central issue of credibility and far from vital to the defense" (A. 40-1).

The conclusions reached by the court simply are not supported by the authorities cited.

In *United States* v. *Alu,* 246 F.2d 29, 33 (1957), this Court held:

> "It has been widely recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with the end of obtaining justice."

To the same effect, see the opinion of Judge Learned Hand in *United States* v. *Chiarella,* 184 F.2d 903, 911 (2d Cir. 1950).

The jury was aware of the fact that Government Exhibit 3511 purported to be a memorandum of a conference between Glasser and government counsel. By using that memorandum for the purpose of ostensibly refreshing

Glasser's recollection, the prestige and credibility of government counsel were placed in the balance. The jury not only had Glasser's claim that he had previously made the assertions in question, but they knew that government counsel concurred in that assertion. By limiting the defense exploration of the matter to cross-examination of Glasser, the court deprived the defense of the only means at its disposal to test the credibility and *accuracy of recollection* of Glasser. In characterizing the incident as collateral and "far from vital to the defense" the court has clearly misconstrued the posture of the case at that point in the evidence. If the defense had any hope of undoing the harm which had been done by Glasser's changed testimony, it was to establish, to the extent possible, exactly what had occurred and what was said during the conference with the prosecutor. Glasser, himself, had no recollection of whether he had volunteered the critical assertion or whether he had given it in response to a question (Tr. 237-8). Indeed, he had very little recollection concerning what had occurred at the meeting (Tr. 230-238).

Thus, the record clearly establishes that the means which the court states the defense counsel had "at his disposal" were simply non-existent.

The knowledge of the defendant was the pivotal issue in this case. Adducing all facts relevant to that issue was, in the words of Judge Waterman, "consonant with the end of obtaining justice", *United States* v. *Alu, as quoted supra,* and the defense should not have been denied the last possibility of resolution.

No possible prejudice could have accrued to the prosecution. If it would have been inappropriate for Mr. Fryman to continue as prosecutor, he had with him a fully qualified and informed co-prosecutor who could have concluded the trial. Mr. Fryman clearly expressed his willingness to testify and to have Mr. Sabetta continue the prose-

cution (*supra*, p. 36). Under these circumstances, it was reversible error, violative of the defendant's constitutional right to call witnesses in his own behalf, for the court to prevent the defense from examining Mr. Fryman, under oath, before the jury.

In *Crawford* v. *United States*, 212 U.S. 183 (1909), the Supreme Court held:

> "There is a presumption of harm arising from the existence of an error against the party complaining, excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such error against a party seeking to review it is not cause for reversal of the judgment" (212 U.S. at 203).

By the *Crawford* standard, appellant was clearly deprived of his right to present his case to the jury and a reversal of his conviction is required.

CONCLUSION

For all of the above reasons, the judgment of conviction should be reversed; in the alternative, the case should be remanded to the District Court for an evidentiary hearing as to the newly discovered evidence.

Respectfully submitted,

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